Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ST. LOUIS COUNTY, MISSOURI, AND COL. G. H. KLEINKNECHT, SUPERINTENDENT, ST. LOUIS COUNTY POLICE DEPARTMENT,

Petitioners,

v.

GARY E. SIMON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

A. Can police agencies and police departments, which are obligated to enforce the law and protect the citizenry of their communities, be obligated by Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. Section 794, to hire a paraplegic as a police officer even though the individual cannot perform, because of his handicap, the law enforcement functions of the position?

B. Do the essential functions of a police officer's position include the ability to enforce state and county law which police officers are sworn to do?

C. Did Congress intend and has this Court construed Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. Section 794, to authorize and mandate that an employer hire a handicapped individual into a particular position when that handicapped individual can perform a useful job or task of the employer but cannot perform the essential functions of the position for which he applies?

D. Can a United States Court of Appeals award and tax attorneys fees and costs to a party pursuant to 42 U.S.C.A. Section 1988 or 29 U.S.C.A. Section 794 a(b):

1. When the party has not been successful in the appellate court on a central issue in the case and has not acquired the primary relief he sought;

2. Prior to any hearing on the extent and nature of the costs and legal services rendered;

3. When the Federal Rules of Appellate Procedure specifically provide that certain costs[1] are to be taxed in the district court?

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[1] i.e. F.R.A.P. 39(e): (1) fee for filing a notice of appeal; (2) costs of the reporter's transcript.

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OPINION BELOW

The opinion of the United State Court of Appeals for the Eighth Circuit entered on August 11, 1981, is not yet officially reported.[2] It is, however, unofficially reported as *Simon* v. *St. Louis County, Missouri,* 26 EPD Para. 32,030 (8th Cir. 1981).

JURISDICTION

Jurisdiction is vested in this Court pursuant to 28 U.S.C.A. Section 1254(1) because petitioners seek by writ of certiorari a

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[2] See Appendix A for the Eighth Circuit's opinion.

review of the judgment of the United States Court of Appeals for the Eighth Circuit which was entered on August 11, 1981. The Eighth Circuit denied petitioners' motion for rehearing on September 9, 1981.

STATUTORY, REGULATORY, CHARTER AND RULE PROVISIONS INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. Section 794:

> "No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (This provision has subsequently been amended by Pub. L. 95-602, Title I Sections 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987.

29 U.S.C.A. Section 794a(b):

> "In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

F.R.A.P. 39(e):

> "Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule."

42 U.S.C.A. Section 1988 (Appendix F, p. 25).

28 U.S.C.A. Section 1254(1) (Appendix F, p. 25).

28 U.S.C.A. Section 1343(3) and (4) (Appendix F, p. 25).

28 U.S.C.A. Section 1331 (Appendix F, p. 26).

28 C.F.R. Sections 42-501-.540 Subpart B, App. B (Appendix F, p. 26).

St. Louis County Charter, Sections 4.275 1. and 2. (Appendix F, p. 29).

STATEMENT OF THE CASE

Simon[3] was appointed a St. Louis County police officer on January 28, 1969. From the date of his appointment until November 24, 1971, Simon held three kinds of assignments in the St. Louis County Police Department: the academy, communications, and a beat officer.

On November 24, 1971, less than three years after his appointment, Simon was wounded in a shooting which resulted in severe injury making him a paraplegic. From November 24, 1971, up to and including the time of trial in August of 1978 and September of 1979, Simon continued to be medically diagnosed as having a condition of paraplegia.

For the first ten months after his injury, Simon was totally incapacitated and bed-ridden. This condition existed on July 5, 1972. From the date of his injury up until approximately June 15, 1972, Simon continued to receive his pay. On July 5, 1972, Colonel Robert J. DiGrazia, then Superintendent of the St. Louis County Police Department, terminated Simon because of his physical condition which left him unable to fulfill the duties of a St. Louis County police officer.

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[3] Respondent.

St. Louis County, at the time of Simon's injury, provided for service disability retirement benefits to police officers if the police officer demonstrated that he:

> ". . . suffers a total and permanent physical or mental disability which prevents him from engaging in any substantial, gainful activity, occupation, or employment for which he may be reasonably qualified by training, education, or experience . . ."

Simon applied for and received said benefits.

In March, 1976, Simon sought employment with the Department as a police officer but he still suffered from and was diagnosed a paraplegic. Simon did not apply for civilian employment.[4]

As a result of Simon's paraplegic condition Simon requires the use of leg braces and crutches to walk. He is unable to support his body weight on either of his legs without the use of crutches and cannot stand without the aid of crutches and leg braces. Simon is not able to run, jump, hop, stoop, turn, pivot or perform similar movements without the aid of a supporting device or without the aid of another person. He cannot drive an automobile without hand controls and automatic transmission and requires the use of braces and crutches to gain ingress and egress from an automobile or motor vehicle.

The Superintendent refused to consider hiring Simon as a police officer because he considered Simon to be physically unable to assume the job of police officer.

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[4] Throughout the history of this matter Simon neither asked for nor was denied civilian employment with the Department. It was suggested that if Simon would apply for civilian employment his application would be given favorable consideration.

A St. Louis County police officer has, *inter alia,* the duty and responsibility to protect life and property, prevent crimes and misdemeanors, apprehend criminals, and enforce state laws and county ordinances. The Department has had a policy of rotating assignments for its commissioned personnel and requires each of its officers, regardless of his or her current assignment, to be able to enforce state law and county ordinances.

Officers injured are allowed to return to work only after they provide a medical statement indicating that they can return to work without limitations.

Simon brought an action under Sections 503 and 504 of the Rehabilitation Act of 1973 (29 U.S.C.A. Sections 793 and 794), *inter alia,* and prayed for attorney fees pursuant to 42 U.S.C.A. Section 1988.[5] Jurisdiction was asserted under 28 U.S.C.A. Section 1343(3) and (4) and 28 U.S.C.A. Section 1331. Simon complained he was illegally discriminated against because of his physical handicap.

The district court, after a full trial on the merits, rendered judgment in favor of petitioners[6] on all issues and ruled that Simon was not an otherwise qualified individual within the meaning of 29 U.S.C.A. Section 794.[7] In rendering its decision the district court relied on this Court's opinion in *Southeastern Community College* v. *Davis,* 442 U.S. 397 (1979).

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[5] At the time the suit was filed 29 U.S.C.A. Section 794 a(b), providing for attorney fees, had not yet been enacted by Congress. Simon has never referenced Section 794a(b).

[6] St. Louis County, Missouri and G. H. Kleinknecht, Superintendent, St. Louis County Police Department.

[7] *Simon* v. *St. Louis County, Missouri,* 497 F. Supp. 141, 151 (E.D. Mo. 1980).

Simon perfected his appeal to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit claimed the district court applied *Davis* too regidly to the instant case and remanded the matter to the district court for it to consider whether the requirements for St. Louis County police officers are reasonable, legitimate and necessary requirements for all positions within the department. (App. A, p. 7).

After the Eighth Circuit rendered its opinion affirming in part, reversing in part, and remanding for further consideration, Simon filed a motion for allowance of attorneys fees and costs on appeal. See Appendix B. The costs, among other things, included the filing fee on appeal and the reporter's transcript. St. Louis County objected to the awarding and taxing of attorneys fees and costs on the basis that the two mentioned costs were not taxable in the appellate court under F.R.A.P. 39(e), Simon was not a prevailing party under 42 U.S.C.A. Section 1988 and, if a prevailing party, St. Louis County was entitled to a hearing in which the reasonableness of attorneys fees and costs could be adjudicated. See Appendices C and D. After acknowledging St. Louis County's objections, the Eighth Circuit allowed attorneys fees and costs without a hearing which included one-half of the transcript costs and docket fee. See Appendix E.

ARGUMENT FOR GRANTING THE WRIT

The Eighth Circuit Court of Appeals in *Simon* v. *St. Louis County, Missouri,*[1] has decided an important and far reaching question of federal law. It has decided who a qualified handicapped individual is under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. Section 794, in a way which is in conflict with this Court's decision in *Southeastern Community College* v. *Davis,* 442 U.S. 397 (1979).

A B C

The Eighth Circuit has construed Section 504 to require police agencies and police departments, which are obligated to enforce the law and protect the citizens of their communities, to hire severely handicapped individuals as police officers even though the individual cannot perform, because of his handicap, the law enforcement functions of the position.

The Eighth Circuit by its decision has dispatched a signal to the handicapped community that they can become police officers but will not be required to perform the essential functions and responsibilities of a police officer. They will be relieved of the responsibility to enforce state and county law if they lack the physical ability to do so.

If the Eighth Circuit Court's opinion is allowed to stand, it will have serious and widespread adverse repercussions and will erode the ability of police departments to maintain an alert, ready and qualified fighting force to meet police emergencies, actions and problems when and where those emergencies, actions and problems arise.

The Eighth Circuit's decision has placed an improper and illegal gloss upon Section 504 for its decision states loud and clear that an employer can be required under Section 504 to hire a

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[1] ____ F.2d ____, 26 EPD Para. 32,030. See Appendix A for text.

handicapped individual into a particular position when that handicapped individual can perform a useful job or task of the employer but cannot perform the essential functions of the position for which applies: that was not the intent of Congress in passing the statute in question.

This Court in *Davis* clearly rejected what the Eighth Circuit Court has now ruled. This Court in interpreting Section 504 stated:

> "The court below, however, believed that the 'otherwise qualified' persons protected by Section 504 include those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap. See 574 F.2d, at 1160. Taken literally, this holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling. It assumes, in effect, that a person need not meet legitimate physical requirements in order to be 'otherwise qualified.' We think the understanding of the District Court is closer to the plain meaning of the statutory language. An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Davis,* 99 S.Ct. at 2367.

After noting part of the above-quoted language in *Davis,* the district court in *Simon* v. *St. Louis County, Missouri,* 497 F.Supp. at 151, concluded:

> "In view of the facts of this case and the holding of the unanimous Supreme Court in *Davis,* the Court concludes that a finding for defendants is required."

The district court, prior to so ruling and after comparing the *Davis* facts to the instant case, stated:

> "In our case, as noted above, the situation is quite similar despite the fact that we deal with an employment situation under section 794 rather than an educational program. In

> short, plaintiff has shown that he is able to perform many of the tasks of the job of a commissioned police officer with the Department and, indeed, nearly all of the tasks of some of its very small bureaus without much accommodation at all. But even he admits that his handicap prevents him from performing nearly all of the physical requirements required of the Department." *Id.*

The St. Louis County Police Department's program requires that each of its officers possess the physical ability to enforce the law regardless of his or her assignment. Officers who are injured on duty are allowed to return to work only after they provide a medical statement indicating that they can return to work without limitations. These requirements when coupled with the Department's policy of rotating assignments have as their purpose: (1) the fulfilling of a police officer's need to have a change from a steady diet of patrol; (2) the training of a police officer in all positions so when he is on patrol he will have a working knowledge of how other department units operate; and (3) the developing of a police officer for promotion to command positions who has a wide range knowledge of the Department.

The St. Louis County Police Department's program and primary mission is the enforcement of state and county law. To further this end, police officers and civilians are employed.

As noted earlier this Court in *Davis* teaches that under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. Section 794, "(a)n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Davis,* 99 S.Ct. at 2367. Thus, if Simon, in spite of his handicap of paraplegia, could physically enforce state and county law, he would be an otherwise qualified handicap under Section 504 and entitled to its protection.

The Eighth Circuit, however, in finding that the district court applied *Davis* too rigidly, (App. A, p. 7), overlooks what

makes a police officer a police officer. The essential functions of a St. Louis County police officer, regardless of his assignment, include:

1. capacity and ability to exercise the authority of the State and County to enforce state law and count ordinances;

2. capacity to apprehend, arrest, prevent crimes and misdemeanors and protect property and the community;

3. capacity to act as a peace and police officer whenever or wherever called upon and to act independently when observation dictates;

4. capacity and ability to perform physical skills and tasks to accomplish items 1, 2 and 3, previously mentioned; and

5. readiness to perform on a 24-hour basis.

The essential functions of a police officer are carried by each commissioned personnel with him or her to each assignment he or she may have while a member of the Department. These functions are not only grounded on a rational basis but are mandated directly by law. St. Louis County Charter, Section 4.275 1. and 2. The district court, from the record, found and held that it comes within the responsibility of a commissioned officer to effect a forcible arrest and aid in disaster emergency relief if necessary and under any circumstances and at any time. *Simon* v. *St. Louis County, Missouri,* 497 F. Supp. at 146.

The Eighth Circuit, however, clearly overlooks and does not take into account the above ingredients which distinguish a police officer from a civilian employee in the St. Louis County Police Department. It has failed to recognize that the above listed ingredients *are* the essential functions of a police officer and make a police officer a police officer.

The Eighth Circuit has fallen into the same trap that the Fourth Circuit Court of Appeals fell into in its decision of *Davis* v. *Southeastern Community College,* 574 F.2d 1158 (4th Cir. 1978). The Fourth Circuit agreed with Davis that her career as a registered nurse should not be foreclosed to her simply because she may not be able to function effectively in all the roles which registered nurses may choose for their career. *Davis* v. *Southeastern Community College,* 574 F.2d at 1161 n. 6.

Simon, like Davis, is arguing that he should not be foreclosed from being a police officer simply because he is not able to function effectively in all of the major roles which a police officer may be called upon to perform. But the constant thread running through each and every police officer of the St. Louis County Police Department is that he must have the ability to enforce the law regardless of his assignment. This is the essence of a police officer, it is what makes a police officer a police officer.

When the Eighth Circuit suggests that Simon may be able to perform many of the functions of particular assignments but not that critical aspect of enforcing state and county law, it has missed the crux of who an otherwise qualified individual is under Section 504 and in missing that crux the Court misconstrues and misapplies this Court's decision in *Davis. Davis* specifically rejected the Fourth Circuit's approach as well as the Eighth Circuit's approach in the instant case. This Court in *Davis,* after referencing and quoting footnote 6 of the Fourth Circuit's decision and after restating Davis' contention that she could perform some of the duties of a registered nurse (99 S.Ct. at 2368), went on to rule that Southeastern Community College did not violate Section 504 of the Rehabilitation Act of 1973. *Davis,* 99 S.Ct. 2371. The Eighth Circuit's suggestion that Simon might be able to perform many of the tasks of certain assignments within the Department was considered and rejected by this Court in *Davis.*

In *Davis* this Court clearly recognizes that an employer may take into consideration the disability of an applicant in determining whether that applicant is qualified to perform the duties of the position for which he is applying. In *Davis* the Court stated:

> "Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an 'otherwise qualified handicapped individual' not be excluded from participating in a federally funded program 'solely by reason of his handicap,' indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." *Davis*, 99 S.Ct. at 2366.

What this Court in *Davis* has said is that an employer may legitimately take into account the disabilities of an applicant for a position in determining whether that person is qualified to fill that position. It's only forbidden to refuse to consider an applicant solely because he is handicapped without any nexus to the job for which he applies.

As in *Davis*, Simon has not shown himself to be an otherwise qualified handicapped individual under Section 504 and the district court so found. Even though Simon did not meet his burden of proof, the Eighth Circuit, nonetheless, remands the cause for the district court to determine whether the Department's requirements - (1) the ability to be able to effect a forcible arrest and render emergency aid; and (2) the capacity to be freely transferred to all positions in the police department - are necessary and legitimate requirements of the job. (App. A, p. 7).

In failing to find from the record that the Department's requirements are reasonable, necessary and legitimate, the Eighth Circuit overlooks a plethora of evidence showing the Depart-

ment's requirements are reasonable, legitimate and necessary. Col. Kleinknecht, whom the district court found to be credible (*Simon* v. *St. Louis County, Missouri,* 497 F.Supp. at 146) and for some inexplicable reason whose testimony the Eighth Circuit questions, testified that a police officer, regardless of his assignment in the St. Louis County Police Department, was required to enforce state law, to enforce county ordinances, to prevent crimes from occurring and, if unable to prevent crimes from occurring, to apprehend those who have committed such crimes or ordinance violations, to provide traffic control, and to provide first aid or life-saving techniques to those injured or hurt that they come in contact with. Kleinknecht stated that the enumerated duties and responsibilities were obligations all Department police officers, regardless of rank or assignment, were obligated to perform. In addition to Col. Kleinknecht, Glen R. Murphy, an eminently qualified expert in the field of police administration, noted that it is an essential requirement that a police officer meet physical requirements before being hired and advised that forty-seven of the fifty states have physical standards that are mandated for any police officer. The expert testimony of Murphy further supports the fact that the Department's requirements are reasonable, legitimate and necessary. Even Simon's expert, Gordon Misner, acknowledged that the term "police officer" was a common generic term in the area of police administration and denoted a particular type of person with certain fundamental skills and tasks.

The Eighth Circuit suggests in its opinion that the physical requirements of the Department are not in fact necessary or were not required of all officers. (App. A, p. 8). To support the contention that the physical requirements are not necessary the court relies on depositions which relate to foreign police departments and gleans from them the finding that there were several useful jobs handicapped individuals could perform. (App. A, p. 8).

St. Louis County has never contended Simon could not perform a useful job in the Department; St. Louis County only contends that he is not qualified to perform a police officer's job. Simon shunned the suggestion of civilian employment. The district court found the Department was ready and willing to consider Simon as a non-commissioned employee with the Department. *Simon* v. *St. Louis County, Missouri,* 497 F.Supp. at 147.

Notably, James Herbert, Deputy Director of Administration of the Memphis Police Department, in his deposition, stated that a paraplegic like Simon would *not* be eligible for employment as a commissioned officer but would be eligible for civilian employment. The St. Louis County Police Department has taken the same position. All that the depositions reflect is that the persons identified are all performing civilian tasks with the title of police officer - none is in a position to enforce the law. The fact that a person can perform a useful job does not support the Eighth Circuit's statement that this shows that physical requirements are not necessary for police officers. A truck driver who is blind can still perform useful tasks.

To support the finding that not all officers in the County Police Department are required to meet the physical requirements, the Eighth Circuit points to three persons who testified when called by Simon - Sgt. O'Donnell, Sgt. Wisdom, and Officer Presley (App. A, p. 8). The Eighth Circuit, however, overlooks the fact that each of these officers testified that he was under no physical disability which prevented him from enforcing state and county law.

LEAA regulations referenced by the Eighth Circuit support the proposition that a police department employer may legitimately take into consideration the medical condition of a police applicant. That the Department of Justice, through the Law Enforcement Assistance Administration, recognizes physical agility in certain jobs, such as a police officer, can be

required is found at 28 C.F.R. Sections 42.501 - .540 Subpart B App. B where it is stated:

> "Recipients may, of course, inquire about an applicant's ability to perform job-related functions. Accordingly, for example, questions regarding the ability to drive a car, shoot a gun, or work steadily over long periods of time or in situations or emergency or stress are proper questions for the job of police officer, while questions as to whether the applicant has epilepsy or a heart condition are not permitted. An employer may, of course, ask whether the applicant can perform a particular job without endangering the applicant or others. * * * An applicant can only be considered to have failed a medical examination if the applicant's medical condition, even with reasonable accommodation, would prevent the applicant from performing the essential functions of the job."

To require the Department to modify its requirements of one's ability to enforce the law and free transferability would be a substantial modification of the Department's operation. This Court in *Davis* plainly stated Section 504 does not require this; extensive modification of a program or the operations of an employer would "constitute an unauthorized extension of the obligations imposed by [the] statute." *Davis,* 99 S.Ct. at 2369.

That the ability to transfer an officer from assignment to assignment within the Department is critical to the Department's needs as well as that of its officers is well documented in the record. The Department has a policy of tenure. All police officers who perform certain assignments, other than patrol assignments, do so for a finite period of time. Some of the underlying purposes of limited tenure in assignments are: to fulfill needs of police officers to have a change from a steady diet of patrol; to train police officers in all positions so when they are on patrol they will have a working knowledge of how other Department units operate; to develop

police officers for promotion to command positions who have a wide knowledge of the Department. The police of rotating assignments had been in effect five years at the time of the trial. The Eighth Circuit in its opinion tacitly admits that Simon did not prove that the Department's policy on transfers was unreasonable when it stated:

> "Although based upon the record before us we are not prepared to state that this is a case where the department's refusal to modify its requirements is unreasonable; it is our view that this case must be remanded to the district court for further consideration of this issue." (App. A, p. 9).

When the Eighth Circuit notes "that the fact Simon has already served in different divisions prior to his injury may satisfy much of the purpose behind the department's alleged transferability requirements," (App. A, p. 8), it highlights its misunderstanding of what the Department's policy is meant to accomplish—a well rounded officer, knowledgable of the various functions and bureaus of the Department who, when promoted, will have an overview rather than a limited view of the Department's overall operation. Simon served in only two capacities - beat patrol and communicatons; and this was almost ten years ago. Clearly, Simon was not and is not a well rounded officer. He has only limited experience which at the time of trial court not have been said to be current.

D

This Court is also asked to review whether Simon is a prevailing party pursuant to 42 U.S.C.A. Section 1988 or 29 U.S.C.A. Section 794a(b) entitling him to attorneys fees and costs on appeal when he has yet to be successful in having any court rule that he was unlawfully discriminated against because of his handicap and has yet to secure a judgment from any court that he is entitled to be hired by the St. Louis County Police Department as a police officer.

While the United States Court of Appeals for the Fifth Circuit has taken the position that a person is not a prevailing party entitled to attorneys fees and costs when that person has not been successful on a central issue in the case and has not acquired the primary relief he seeks, *Iranian Students Ass'n* v. *Edwards,* 604 F.2d 352, 353 (5th Cir. 1979), the Eighth Circuit in the instant case, by awarding attorneys fees and costs (See Appendix E), has implicitly held that Simon is a prevailing party. For one to conclude that Simon is *not* a prevailing party all one has to do is to look at what the Eighth Circuit said:

> "Although based upon the record before us we are not prepared to state that this is a case where the department's refusal to modify its requirements is unreasonable; it is our view that this case must be remanded to the district court for further consideration of this issue.
>
> "On remand, the district court should consider whether the requirements for police officers of St. Louis County, as testified to at trial by Colonel Kleinknecht, are reasonable, legitimate, and necessary requirements for all positions within the department. * * *" (App. A, p. 9).

In the event that Simon is determined to be a prevailing party and entitled to attorneys fees, then fairness dictates that before any attorneys fees and costs are granted and taxed, St. Louis County should be entitled to a hearing at which the reasonableness of the attorneys fees and costs can be adjudicated. Any hearing should be held in the district court and the amount of any attorneys fees should be determined by established criteria. *Morrow* v. *Dillard,* 580 F.2d 1284, 1300 (5th Cir. 1978).

The question presented to this Court is whether a court of appeals without the benefit of a hearing and testimony on the extent and nature of legal services rendered and costs expended can in fairness and without denying due process award attorneys fees without the guidance of a record or supporting evidence.

See *Gay Lib* v. *University of Missouri,* 558 F.2d 848, 857 (8th Cir. 1977) cert. den. 434 U.S. 1080, and *Wharton* v. *Knefel,* 562 F.2d 550, 558 (8th Cir. 1977) where the Eighth Circuit summarily accords attorneys fees on appeal without a hearing.

This Court needs to establish criteria for the circuits to follow on who a prevailing party is on appeal pursuant to 42 U.S.C.A. Section 1988 and 29 U.S.C.A. Section 794a(b) and how the reasonableness of attorneys fees and costs on appeal, when properly allowable, can be adjudicated with fairness to both sides.

Ancillary to the question presented is the question by what authority does a United States Court of Appeals ignore the specific directions of the Federal Rules of Appellate Procedure when those rules specifically deny an appellate court the authority to tax certain costs in the circuit court. In the instant case F.R.A.P. 39(e) provides:

> ". . . the costs of the reporter's transcript * * * and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule."

The Eighth Circuit, nonetheless, taxed the fee for filing the notice of appeal and the cost of the reporter's transcript in the circuit court. See Appendix E.

CONCLUSION

The petition for writ of certiorari should be granted because:

1. the Eighth Circuit has added an impermissible gloss to Section 504 which is contrary to this Court's decision in *Davis* and which is inimical to police departments and police agencies throughout the Nation;

2. the Eighth Circuit's decision, if allowed to stand, will have serious and widespread adverse effects on police departments' abilities to maintain a ready fighting force to meet police problems when and where they arise;

3. this Court need to address the issue of whether the essential functions of a police officer's position under Section 504 encompass the enforcement of state and county law;

4. this Court needs to clarify who a prevailing party on appeal is under 42 U.S.C.A. Section 1988 and 29 U.S.C.A. Section 794a(b) when the party does not secure the primary relief he seeks;

5. this Court needs to establish procedurally how the reasonableness of attorneys fees and costs should be adjudicated with fairness to all.

Respectfully submitted,

THOMAS W. WEHRLE
ST. LOUIS COUNTY COUNSELOR

Andrew J. Minardi
Assoicate County Counselor
County Government Center
41 South Central
Clayton, MO 63105
(314) 889-2042

Attorneys for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1667

Gary E. Simon,
Appellant,

v.

St. Louis County, Missouri, a Political Subdivision of the State of Missouri; Colonel G. H. Kleinknecht, Supt. of the St. Louis County Police Department, an Agency of St. Louis County, Missouri, both individually and in his official capacity,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: April 16, 1981

Filed: August 11, 1981

Before HEANEY, STEPHENSON and McMILLIAN, Circuit Judges.

STEPHENSON, Circuit Judge.

Plaintiff-appellant Gary Simon brought an action in the district court[1] alleging that defendants-appellees had illegally

[1] The Honorable Edward L. Filippine, United States District Judge for the Eastern District of Missouri.

discriminated against him because of his physical handicap in refusing to rehire or reinstate him as a commissioned police officer for St. Louis County. Simon appeals from a judgment in favor of appellees on all issues. The district court held, *inter alia,* (1) that Simon had no private right of action under section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793; (2) that although Simon had standing to bring a private right of action under section 504 of the Act, 29 U.S.C. § 794, he did not establish appellees' liability under that statute; and (3) that appellees had not violated Simon's due process rights to resinstatement.[2] We affirm in part, reverse in part, and remand for further consideration.

I. FACTS

Simon was a commissioned police officer in St. Louis County, Missouri. On November 24, 1971, Simon was shot and wounded, and was diagnosed as having a condition of paraplegia. On July 5, 1972, he was terminated as a St. Louis County commissioned police officer for the stated reason that because of his injury, he was unable to fulfill the duties of a St. Louis County police officer.[3]

Simon was still diagnosed as a paraplegic at the time of trial, in August of 1978 and September of 1979, although his condition had improved somewhat through surgery and rehabilitative

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[2] The district court also held that there was no violation of Simon's due process rights in his termination without a pretermination hearing. Simon has not challenged this holding on appeal. In any event, we agree with the district court that under the particular facts of this case Simon received that process which was due.

[3] Another stated reason for the termination was that the injury did not occur while Simon was in the line of duty. Simon successfully appealed a denial of disability benefits and, in so doing, obtained a reversal of the department's position that he was not in the line of duty.

treatment. He required the use of leg braces and crutches to walk and could not support the weight of his body on either leg without the aid of crutches. It was further stipulated, and the district court found:

> He cannot rum, jump, hop, stoop, turn, pivot or perform similar movements without the aid of a supporting device or the aid of another person. Plaintiff requires the use of braces and crutches to gain ingress and egress from an automobile or other motor vehicle. He cannot drive an automobile without the aid of specially fitted hand controls and automatic transmission.

Simon v. *St. Louis County,* 497 F. Supp. 141, 144 (E.D. Mo. 1980).

In March of 1976, Simon met with defendant Colonel G. H. Kleinknecht, Superintendent of the St. Louis County Police Department, and requested that he be reinstated as a commissioned police officer. Colonel Kleinknecht refused to consider Simon because he considered Simon to be physically unable to assume the job. Simon made a formal application for a job as a commissioned police officer on August 16, 1976. He has not been reinstated.

The police department is run on a daily basis by the superintendent, who serves under a Board of Police Commissioners. The superintendent is responsible to the Board for the supervision, management, and control of the police department and all its personnel.

II. SECTION 503

Simon alleges that appellees violated section 503 of the

Rehabilitation Act of 1973, 29 U.S.C. § 793.[4] The district court, relying on *Rogers* v. *Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir.), *cert. denied*, 101 S. Ct. 246 (1980), held that there was no private right of action available to Simon under section 503.

Section 503 does not expressly provide for a private right of action. In determining whether a private right of action is implicit in a statute not expressly providing so, the standards of *Cort* v. *Ash*, 422 U.S. 66 (1975), and its progeny, *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), apply. We have examined the factors in *Cort* v. *Ash*, *supra*, in detail and find ourselves in basic agreement with the analysis in *Simpson* v. *Reynolds Metals Co.*, 629 F.2d 1226, 1237-44 (7th Cir. 1980), and *Rogers* v. *Frito-Lay, Inc.*, *supra*, 611 F.2d at 1078-85, both

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[4] 29 U.S.C. § 793 provides in pertinent part:

(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

of which held that there was no private right of action pursuant to section 503.[5] We therefore affirm the district court's holding that there is no private right of action under section 503.

III. SECTION 504

In *Carmi* v. *Metropolitan St. Louis Sewer District,* 620 F.2d 672 (8th Cir. 1980), *cert. denied,* 101 S. Ct. 249 (1981), this court held that an individual plaintiff had a private right of action under section 504 of the Act if a primary objective of the defendant's federal funding was to provide for employment.[6]

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[5] *Accord, Hoopes* v. *Equifax, Inc.,* 611 F.2d 134, 135 (6th Cir. 1979). These appear to be the only circuit court decisions on this issue. The district court decisions on this point are fairly evenly divided between those holding section 503 creates a private right of action; *e.g., California Paralyzed Veterans Ass'n* v. *F.C.C.,* 496 F. Supp. 125, 127-31 (C.D. Cal. 1980); *Clarke* v. *Felec Services, Inc.,* 489 F. Supp. 165 (D. Alaska 1980); *Hart* v. *County of Alameda,* 485 F. Supp. 66 (N.D. Cal. 1979); *Chaplin* v. *Consolidated Edison Co.,* 482 F. Supp. 1165 (S.D.N.Y. 1980); *Duran* v. *City of Tampa,* 430 F. Supp. 75 (N.D. Fla. 1977); *Drennon* v. *Philadelphia Gen. Hosp.,* 428 F. Supp. 809 (E.D. Pa. 1977), and those holding section 503 does not create a private right of action, *e.g., Meyerson* v. *Arizona,* 507 F. Supp. 859 (D. Ariz. 1981); *Langman* v. *Western Elec. Co.,* 488 F. Supp. 680, 685-86 (S.D.N.Y. 1980); *Coleman* v. *Noland Co.,* 21 F.E.P. 1248 (W.D. Va. Jan. 18, 1980); *Doss* v. *General Motors Corp.,* 478 F. Supp. 139 (C.D. Ill. 1979); *Miglets* v. *Erie Lackawanna Ry.,* 19 F.E.P. 379 (N.D. Ohio Feb. 28, 1979); *Anderson* v. *Erie Lackawanna Ry.,* 468 F. Supp. 934 (N.D. Ohio 1979); *Wood* v. *Diamond State Telephone Co.,* 440 F. Supp. 1003 (D. Del. 1977).

[6] *Carmi* v. *Metropolitan St. Louis Sewer Dist.,* 620 F.2d 672, 674-75 (8th Cir. 1980), limited what had been construed to be a broader private right of action under section 504, *see, e.g., United Handicapped Fed'n* v. *Andre,* 558 F.2d 413, 415 (8th Cir. 1977). This limitation was premised upon the 1978 amendments to the Rehabilitation Act of 1973, which made available to persons aggrieved under section 504 the rights, remedies, and procedures of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* Section 2000d-3 provides that no action may be brought against a defendant "except where a primary objective of the federal financial assistance is to provide employment."

We have examined the record in the instant case and agree with the district court that a primary objective for the federal funds going to the St. Louis County Police Department is to provide for the employment of commissioned police officers. Thus, the district court properly concluded that Simon had standing to bring a suit under section 504.

Section 504 provides in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency * * *. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section * * *.

The district court first addressed the issue of whether Simon was an "otherwise qualified handicapped individual." Relying on *Southeastern Community College* v. *Davis,* 442 U.S. 397 (1979), the district court determined that Simon was not an otherwise qualified person.

Davis involved a plaintiff with a serious hearing disability who sought to be trained as a registered nurse. Upon the basis of a medical examination, defendant Southeastern Community College determined that plaintiff's hearing disability made it unsafe for her to practice as a nurse. She could not understand speech without reliance upon lip reading. It was also determined that it would be impossible for plaintiff to participate safely in the normal clinical program without substantial modifications, and that those modifications would in fact keep her from realizing the benefits of the program. She was denied admission into the program and as a result brought suit under section 504. The Supreme Court found that plaintiff could not recover because she had not shown herself to be an otherwise qualified person.

The district court, in the instant case, concluded that Simon could not perform all of the department's physical requirements, and that *Davis* states that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College* v. *Davis, supra,* 442 U.S. at 406. The district court therefore held that Simon was not an otherwise qualified applicant. Furthermore, the court found the modifications the police department would have to make would be substantial.

It is our view that the district court's reading of *Davis* is too rigid. The Supreme Court in *Davis* referred to those handicapped persons who could satisfy all of the "*legitimate* physical requirements" of the defendant's program. *Id.* at 406. Part III of the *Davis* opinion discusses whether the physical qualifications Southeastern demanded of the applicant were necessary for participation in its nursing programs. It concluded that the ability to understand speech without lip reading was necessary during the clinical phase of the program and indispensible for many functions that a registered nurse performs. *Id.* at 407. The Supreme Court noted that the *only evidence in the record* indicated that nothing less than close, individual attention by a nursing instructor would be sufficient to insure patient safety if respondent took part in the clinical phase of the nursing program. *Id.* at 409.

The proper focus in this case is therefore whether the requirements set forth by defendants—(1) the ability to be able to effect a forcible arrest and render emergency aid; and (2) the capacity to be freely transferred to all positions in the police department—are necessary and legitimate requirements of the job. The district court implicitly concluded they were, but also found that "plaintiff has shown that he is able to perform many of the tasks of the job of a commissioned police officer with the Department, and, indeed, nearly all of the tasks of some of its very small bureaus without must accommodation at all." *Simon* v. *St. Louis County, supra,* 497 F. Supp. at 151.

Our situation is different from that in *Davis*. There is substantial evidence in the record indicating that the physical requirements of the St. Louis County Police Department were not in fact necessary,[7] or were not required of all officers.[8] There was further evidence indicating that the ability of an officer to be completely transferable among all positions was sometimes not required in fact.[9] Nearly all of the evidence that the requirements (*i.e.* the physical ability to effect a forceful arrest, render aid, and to be able to perform all functions of all the departments' positions) are necessary consisted of the testimony of Colonel Kleinknecht.

The Supreme Court in *Davis* stated:

> We do not suggest that the line between a lawful refusal to extend affirmative action and legal discrimination

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[7] Depositions indicated that the police departments for Memphis and Kansas City both allowed police officers who became severely handicapped during their employment to remain with the department as commissioned police officers. The depositions indicated those cities' police departments were of the view that there were several useful jobs these individuals could perform.

[8] There were at least three persons testifying for Simon who had been injured during their employment but remained on the force as commissioned police officers. An examination of the record indicates these individuals did not satisfy all of the physical requirements established in the Department Regulations.

[9] The evidence from appellees' records indicated several officers had remained in one department for from four to ten years. These departments included Communications, Criminal Investigation, and Juvenile Affairs. We note that Communications is an area where the district court determined Simon's handicap would not prevent him from performing the great majority of the tasks.

We also note that the fact Simon already has served in different divisions prior to his injury may satisfy much of the purpose behind the department's alleged transferability requirements.

> against handicapped persons always will be clear. It is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program. Technological advances can be expected to enhance opportunities to rehabilitate the handicapped or otherwise to qualify them for some useful employment. Such advances also may enable attainment of these goals without imposing undue financial and administrative burdens upon a State. *Thus, situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.*

Southeastern Community College v. *Davis, supra,* 442 U.S. at 412-13 (emphasis added).

Although based upon the record before us we are not prepared to state that this is a case where the department's refusal to modify its requirements is unreasonable; it is our view that this case must be remanded to the district court for further consideration of this issue.

On remand, the district court should consider whether the requirements for police officers of St. Louis County, as testified to at trial by Colonel Kleinknecht, are reasonable, legitimate, and necessary requirements for all positions within the department. The district court should determine whether the ability to make a forceful arrest and the ability to perform all of the duties of all of the positions within the department are in fact uniformly required of all officers. If not uniformly required, they should not be considered actual requirements for all positions. Also, consideration should be given to Simon's actual physical condition in combination with Simon's police experience, and further determinations made as to exactly what functions within the department he has the physical abilities to perform. Finally, the court should determine whether the accommodations necessary

in order to employ Simon as a commissioned police officer are unreasonable.[10]

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[10] It is clear that there is no requirement upon appellee to "effect substantial modifications of standards to accommodate a handicapped person." *Southeastern Community College* v. *Davis,* 442 U.S. 397, 413 (1979). While the district court below held that substantial accommodations would be required, it is our view that this was based on the yet to be established assumption that the requirements were in fact necessary to the job.

The Department of Justice, through the Law Enforcement Assistance Administration (LEAA), is the agency providing federal assistance to the St. Louis County Police Department. It has recently established guidelines for the recipients of its federal assistance as required by section 504. 28 C.F.R. § 42.501-.540. These regulations have been drawn in light of *Davis,* and define "qualified handicapped person" as follows: "[w]ith respect to employment, a handicapped person who, with reasonable accommodation, can perform the essention functions of the job in question." 28 C.F.R. § 42.540(e). *See* 29 U.S.C. § 706(7)(B).

The analysis of these regulations, published at 28 C.F.R., Subpart. D App. B, discusses *Southeastern Community College* v. *Davis, supra,* and concludes:

> The critical consideration in determining whether a handicapped person qualifies for participation in a program or activity receiving assistance from the Department is whether a particular physical or mental ability is a necessary prerequisite for effective participation, or whether that ability is only said to be necessary because a recipient of Federal funds has not given adequate consideration to the ways in which stated requirements may be modified in order to permit participation by handicapped persons.

Another commentator has interpreted *Southeastern Community College* v. *Davis, supra,* to suggest the following rule:

> refusal to make accommodations to the special needs of the handicapped becomes illegal when, in view of the relative ease of making the adjustment and other factors bearing in the reasonableness of the policy, the refusal can be said to reflect an animus against handicapped persons.

4 A. Larson, Employment Discrimination § 106.42 at 22-21. *See generally* 28 C.F.R. § 42.511.

IV. CONSTITUTIONAL CLAIMS

Simon also alleges on appeal that appellees' physical examinations standards for employment were not reasonably related to the requirements of appellees' program or the employment positions for which Simon applied. Simon alleges this in effect violates his due process rights. The district court considered this claim and found that Simon was not the victim of an improper, irrebuttable presumption, as he had alleged. *See Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974) (striking mandatory maternity leave for teachers provison stating, "the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing."); *Stanley* v. *Illinois,* 405 U.S. 645 (1972) (striking down on due process grounds an irrebuttable presumption that unmarried fathers are incompetent to raise their children). *See also Gurmankin* v. *Costanzo,* 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd,* 556 F.2d 184 (3d Cir. 1977); *Duran* v. *City of Tampa,* 430 F. Supp. 75 (M.D. Fla. 1977).

It is immaterial whether this is considered to be a procedural or substantive due process claim. The substantive aspect of due process protects individuals from arbitrary or irrational governmental action. This circuit has taken the majority position[11] that the absence of any claim by the plaintiff that an interest in property or liberty has been impaired is a fatal defect in both procedural due process and substantive due process claims. *Buhr* v. *Buffalo Public School District No. 38,* 509 F.2d 1196, 1202-03 (8th Cir. 1974). Simon has no constitutionally protected property or liberty interest in employment with the St. Louis County Police Department. *See Carmi* v. *Metropolitan St. Louis Sewer District, supra,* 620 F.2d at 675-76; *Coleman* v. *Darden,* 595 F.2d 533, 537-38 (10th Cir. 1979). Simon's claim, whether based upon procedural or substantive due process, must therefore fail.

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[11] *See* cases cited in *Kindem* v. *City of Alameda,* 502 F. Supp. 1108, 1113 & nn.12, 13 (N.D. Cal. 1980).

Although not specifically argued in his brief, Simon's argument in this regard could also be construed to allege a violation of the Equal Protection Clause of the Fourteenth Amendment. It is our view that Simon has not demonstrated that he is a member of a class which has been treated in a patently arbitrary manner. Evidence which Simon introduced at trial indicated that several police officers who suffered some type of disability while an officer were allowed to continue on the force as commissioned police officers, often in a differently capacity. A classification which, in effect, prohibits the hiring of police officers who are unable to run, jump, hop, stoop, turn, pivot, or perform similar movements without aid is rationally related to appellees' asserted goal of protecting the public by having physically fit police officers. *See Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 314-16 (1976). The appellees have perhaps not chosen the best means to accomplish this purpose, but, where rationality is the test, a state does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect. *Id.* at 316.

V. OTHER ISSUES

The court admitted into evidence the report summary of a medical examination of Simon by Dr. Samuel W. Hardy. The summary appears in the district court's Findings of Fact #15, *see* 497 F. Supp. at 145. The report concluded:

> I can see no leeway open to me either by the stated physical requirements of this department *nor by the dictates of common sense* to judge Mr. Simon capable of doing police work and it is with regret and sadness that I am forced to find him not an acceptable applicant.

(emphasis added). Simon objected to the italicized portion of the report. He argues the comment is improper opinion evidence and lacks foundation, relying on Fed. R. Evid. 601, 702. The district court has wide discretion in the admission of

expert testimony. The phrase in the report appears to be of little probative value; in this trial to the court, we cannot say that Simon was prejudiced by the refusal to strike this phrase.

We have examined Simon's other contentions and find them without merit.

This cause is remanded to the district court for further consideration consistent with Part III of this opinion.

Affirmed in part, reversed and remanded in part, with instructions.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1667

Gary E. Simon,
Appellant,

vs.

St. Louis County, Missouri, et al.,
Appellees.

APPELLANT'S MOTION FOR ALLOWANCE OF ATTORNEYS FEES ON APPEAL

Comes now the Appellant, by and through the undersigned, his attorney, and states to the Court as follows:

1. That this is an appeal from the United States District Court for the Eastern District of Missouri, in which Appellant contended that the District Court had erred in dismissing his complaint pursuant to (inter alia) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

2. On August 11, 1981, this Court filed its opinion, reversing the decision of the District Court, and remanding this cause to the District Court for further consideration; and by reason thereof, Appellant is the prevailing party.

3. This Court has assessed costs on appeal against Appellees.

4. By reason of the foregoing, this Court should order Appellees to pay Appellant's reasonable attorneys fees on appeal. Attached to this Motion as Exhibit A is a summary of the services rendered by the undersigned in connection with this ap-

peal; and expenses incurred by the undersigned in connection with this appeal.

5. The said expenses for long distance telephone conversations with Kent Hull, representing the *amicus* in connection with this appeal, were necessary to this appeal; and each and every of the legal services described on the attached Exhibit A was likewise necessary to the prosecution of this appeal.

6. The undersigned states that his reasonable attorneys fees in prosecuting this appeal are in the amount of $2,595.00; and that the reasonable expenses incurred in long distance telephone conversations in connection with this appeal are in the amount of $38.56; all as shown as on the attached Exhibit A.

WHEREFORE, Appellant moves the Court to order Appellees to pay to Appellant the sum of $2,632.56, as and for Appellant's attorneys fees and expenses reasonably incurred in prosecuting this appeal.

/s/ FRANCIS L. RUPPERT
Attorney for Appellant

EXHIBIT A

GARY SIMON FILE NO 5905 Time and Charges re: Appeal

Date	Atty	Hrs	Service	Costs & Expenses
07/01/80	FLR	1.2	Ofc con w/client	
07/07/80	FLR	0.2	TC w/client	
07/15/80	FLR	0.2	TC w/client re: appeal	
07/15/80	FLR	0.2	TC w/Mary Fahey	
07/17/80	FLR	0.2	TC w/Kent Hull	
07/22/80	FLR	1.4	TC w/court officials/prep. appeal	
07/25/80	FLR	0.5	File Notice of Appeal	
07/25/80	CST		Filing Fee	$ 70.00
08/04/80	FLR	0.3	TC w/client	
08/11/80	FLR	0.2	TC w/Magnano/client	
08/11/80	FLR	3.4	TC w/Hull/work on appeal	
08/12/80	DMB	1.0	File Designation of Record	
08/12/80	FLR	0.4	TC w/Kent Hull	
08/21/80	EXP		Long Distance	5.29
08/21/80	FLR	0.1	TC w/Kent Hull	
08/21/80	FLR	0.2	TC w/client	
08/27/80	FLR	0.2	TC w/Bakey	
09/02/80	CST		Paid for Transcript	1976.00
09/03/80	TCC	0.7	To Court/pick up transcript	
09/06/80	FLR	1.1	Ofc con w/client/prep motion	
09/26/80	FLR	0.1	TC w/client	
09/27/80	FLR	3.5	Appellate Brief	
09/29/80	FLR	4.2	Appellate Brief	
09/29/80	EXP		Long Distance	7.31
09/29/80	FLR	0.1	TC w/Kent Hull	
09/30/80	FLR	0.1	TC w/Kent Hull	
09/30/80	FLR	6.3	Appellate Brief	
10/01/80	FLR	4.2	Appellate Brief	
10/02/80	FLR	2.9	Proof Brief	
10/02/80	TCC	0.8	To Court to file brief	
10/03/80	FLR	0.1	TC w/client	
10/03/80	FLR	0.5	Mail Appellate Brief to Amicus	
10/03/80	TCC	0.3	Deliver Brief to Appellees	
10/06/80	FLR	0.1	TC w/clerk	
10/07/80	CST		Copy Transcript	12.14

10/13/80	EXP		Long Distance Phone	3.08
10/13/80	FLR	0.2	TC w/Kent Hull	
10/13/80	FLR	0.2	Brief Addendum	
10/13/80	FLR	0.1	TC w/Mrs Simon	
10/17/80	FLR	0.3	TC w/Simon	
10/20/80	FLR	0.1	TC w/Joe Hagen	
10/24/80	FLR	0.4	TC w/PVA	
10/24/80	EXP		Long Distance Phone	6.72
10/28/80	FLR	0.2	TC w/client	
11/07/80	FLR	0.8	TC w/PAV/Review Appellee Brief	
2/18/81	CST		Paid for printing brief	337.48
03/19/81	FLR	0.2	Ltr t/client	
03/19/81	FLR	0.5	TC w/Kent Hull	
03/19/81	EXP		Long Distance	11.81
03/21/81	FLR	0.2	TC w/client	
04/01/81	FLR	0.2	TC w/Imbrogno/atty	
04/01/81	EXP		Long Distance	4.35
04/13/81	FLR	0.4	Review Amicus Brief	
04/16/81	FLR	5.6	TC w/client/Argument prep./Argument	
04/21/81	FLR	0.2	Ltr t/client	

Totals

Franscis L. Ruppert - Attorney	41.5 hrs @ $60.00 per hour	$2,490.00
Thomas C. Conroy - Attorney	1.8 hrs @ $50.00 per hour	90.00
Diane M. Barry - Law Clerk	1.0 hrs @ $15.00 per hour	15.00
Costs		2,395.62
Expenses		38.56
Total		$5,029.18

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1667

Gary E. Simon,
Appellant,

v.

St. Louis County, Missouri, et. al.,
Appellees.

APPELLEES' OBJECTION TO APPELLANT'S MOTION FOR ALLOWANCE OF ATTORNEY FEES ON APPEAL

Appellees object to Appellant's Motion for allowance of attorney's fees on appeal and states as follows:

1. This Court rendered its judgment and opinion on August 11, 1981;

2. The Court has yet to issue its mandate as provided in F.R.A.P. 41;

3. Appellees have timely filed a Motion for Rehearing pursuant F.R.A.P. 41(a) which has the effect of staying the issuance of the mandate until the petition is disposed of by the Court. F.R.A.P. 41(a).

Until Appellees' motion for rehearing is ruled upon and until Appellees exhaust their other remedies of review of the Court's actions, it cannot be said that Appellant is a prevailing party entitled to attorney fees and costs on appeal;

4. Since the Court's judgment and opinion affirmed in part and reversed in part, costs are only to be allowed as ordered by the Court. F.R.A.P. 39(a). Prior to the allowance of any attorney's fees and costs on appeal, Appellees request the Court to grant Appellees a hearing in which the reasonableness of the attorney's fees and costs may be adjudicated. Said hearing, in fairness to Appellees, should be held before the district court but not before Appellees have had the opportunity to request and secure from the United States Supreme Court a ruling on the correctness and propriety of this Court's opinion and judgment rendered by Division I on August 11, 1981;

5. In addition to the foregoing many of the proposed costs Appellant asks this Court to allow are not properly taxable in this Court i.e. $1,976.00 in transcript costs, *inter alia.* F.R.A.P. 39(e) provides that:

> "Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal * * * shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule."

Based on the foregoing Appellees pray the Court to disallow and overrule Appellant's motion for allowance of attorney's fees and costs on appeal.

Respectfully submitted

THOMAS W. WEHRLE
County Counselor

By Andrew J. Minardi #18955
Associate County Counselor
County Government Center
41 S. Central
Clayton, MO 63105
889-2042

Attorneys for Appellees

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1667

Gary E. Simon,
Appellant,

v.

St. Louis County, Missouri, et al.,
Appellees.

APPELLEES' PARTICULAR OBJECTIONS TO ATTORNEY'S FEES AND COSTS SOUGHT TO BE TAXED BY APPELLANT

1. Appellees filed their objection to Appellant's Motion for Allowance of Attorneys Fees on Appeal on or about August 31, 1981;

2. This Court by its order of September 17, 1981, directed appellees to:

> ". . . specify in writing with particularity their objection to the attorney fees sought by appellant."
>
> "If there are other costs which appellees contend should not be taxed in this court, they should so specify with particularlity."

3. In accord with this Court's Order of September 17, 1981, appellees state:

(a) *COSTS:*

Assuming appellant is a "prevailing party", the Seventy Dollar ($70.00) filing fee on appeal under date of 7/25/80

on appellant's attachment to his motion for allowance of attorneys fees on appeal is not taxable in this Court. F.R.A.P. 39(e).

(b) *ATTORNEYS FEES:*[1]

(i) Appellant is not a "prevailing party" entitled to attorney's fees and costs under 42 U.S.C. 1988 as he has not been successful on a central issue in the case and he has not acquired the primary relief he sought, i.e. employment as a St. Louis County police officer. *Iranian Students Ass'n.* v. *Edwards,* 604 Fed.2d 352, 353 (5th Cir. 1979);

(ii) This Court in a five-part opinion affirmed the district court on four of the five parts. As to part III this Court stated:

"Although based upon the record before us we are not prepared to state that this is a case where the department's refusal to modify its requirements is unreasonable; it is our view that this case ought to be remanded to the district court for further consideration of this issue." Slip Opn. p. 10.

In remanding pursuant to part III of the Court's opinion, it granted appellant none of the relief he sought from the district court, i.e. he has not secured as a result of the Court's ruling a position as a St. Louis County police officer.

(iii) Since this Court's judgment and opinion affirmed in part and reversed in part, costs, which in this case include attorney's fees, are only to be allowed as ordered by the Court. F.R.A.P. 39(a).

---

[1] 42 U.S.C. 1988 provides that attorney fees are part of the costs.

Appellees object to the granting of any costs or attorney's fees on the bases that appellant is not a prevailing party.

In the alternative appellees object to the awarding of attorney's fees and costs without a hearing. If any attorney's fees are to be granted appellees should be granted an opportunity to have a hearing in which the reasonableness of the attorney's fees and costs may be adjudicated. Said hearing should be held before the district court and the amount of any attorney's fees should be determined by established criteria.

Based on the foregoing appellees pray the Court to disallow and overrule appellant's motion for allowance of attorney's fees and costs on appeal.

Respectfully submitted,

THOMAS W. WEHRLE
County Counselor

By Andrew J. Minardi
Associate County Counselor
County Government Center
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889-2042

Attorneys for Appellees

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1667

Gary E. Simon,
Appellant,

v.

St. Louis County, Missouri, et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Filed: October 1, 1981

Before HEANEY, STEPHENSON and McMILLIAN, Circuit Judges.

ORDER

The court has considered appellant's motion for allowance of attorney fees and costs on appeal and appellees' resistance thereto.

It is ordered that appellees, St. Louis County, Missouri, et al., pay one-half of the costs incurred by appellant in prosecuting this appeal, including one-half of the transcript costs and docket fee.

It is further ordered that attorney fees in the amount of $1,500.00 are awarded to counsel for appellant on the appeal.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX F

Statutory, Regulatory, Charter And Rule Provisions Involved

42 U.S.C.A. § 1988:

> * * * In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

28 U.S.C.A. § 1254(1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *

28 U.S.C.A. § 1343:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C.A. § 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity.

* * * *

28 C.F.R. §§ 42.501-.540 Subpart B, App B:

* * * *

The proposed rule places an obligaton on the recipient to use job-related tests or other job-related selection criteria which screen out the fewest qualified handicapped persons and to "administer tests using procedures (e.g., auxiliary aids such as readers for visually-impaired persons or qualified interpreters for hearing-impaired persons) which accommodate the special problems of handicapped persons to the fullest extent, consistent with the objectives of the test" (§ 42.512). Thus an oral test given to an applicant with a speech impediment would be improper where the eseential functions of the job do not require clear speech. Where physical agility and visual acuity are necessary to perform the essential functions of a job, tests measuring those factors are permitted. To further clarify this obligation the Department has, at the recommendation of several commentators, added language to § 42.512 drawn from the HEW section 504 rule (see 45 CFR 84.13(b)) to the effect

that tests are to measure job qualifications and not impaired sensory, manual, or speaking skills, excpet where those skills are the factors that the test purports to measure.

A recipient is prohibited from making pre-employment inquiry regarding an applicant's physical or mental handicaps except where the recipient is taking remedial or voluntary action under § 42.505(a) or (b) of this subpart, affirmative action under section 503 of the Act, or conducting a permissible pre-employment physical examination. Under such circumstances, response to the inquiries must be voluntary and certain safeguards (e.g., confidentially) must be maintained by the employer (§ 42.513(b)). Recipients may, of course, inquire about an applicant's ability to perform job-related functions. Accordingly, for example, questions regarding the ability to drive a car, shoot a gun, or work steadily over long periods of time or in situations of emergency or stress are proper questions for the job of police officer, while questions as to whether the applicant has epilepsy or a heart condition are not permitted. An employer may, of course, ask whether the applicant can perform a particular job without endangering the applicant or others. Further, an application form containing a checklist of diseases and conditions is not permitted. However, nothing in this subpart prohibits an employer from setting forth validated medical requirements in recruitment material. Medical examinations are permitted, after a conditional job offer has been made, if the examinations are administered to all entering employees in a nondiscriminatory manner and the results are treated on a confidential basis (§§ 42.513(a) and (b)). An applicant can only be considered to have failed a medical examination if the applicant's medical condition, even with reasonable accomodation, would prevent the applicant from performing the essential functions of the job.

The ban on pre-employment inquiry regarding physical or mental handicaps is required under the HEW standards for the development of Federal agency section 504 regulations. See 45 CFR 85.55, 43 FR 2132, 2138 (January 13, 1978). Its purpose is to insure that job decisions are not infected with non-job related consideration. For example, an applicant for the position of police officer completes the application process, the written examination, and the oral interview satisfactorily and is offered the position conditioned on the successful completion of a medical examination. The medical exam reveals that the applicant has a history of epilepsy. At this point the police department must make a decision whether the behavioral manifestations of the applicant's particular handicap would prevent the applicant from performing the essential functions of the job.

One virtue of this standard is that it makes it possible to determine whether the reason for not hiring a handicapped person is because of handicap. We also believe that legitimate purposes for obtaining such information are fulfilled as well at this later stage in the hiring process.

The misunderstanding of this section apparent in many comments makes it important to emphasize again that this provision does not prohibit taking job-related conditions into account in making employment decision, nor does it preclude a recipient from obtaining information as to such conditions. It merely affects the time at which and the manner in which the information may be obtained. (HEW Final Rule, Implementation of Executive Order 11914, 43 FR 2132, 2135, January 13, 1978).

Of course, where pre-employment job-related questions disclose an inability to perform a job as a result of a handicap, a decision not to employ may be made on that basis. Where recipients conduct extensive background security

checks for prospective employees, a conditional offer of employment could be made contingent upon successfully passing both a medical examination and background check. The medical examination could occur first and if the applicant did not pass it, there would be no need for the background check. The results of the medical examination must, of course, remain confidential and could not be given to the person conducting the background check.

* * * *

St. Louis County Charter Section 4.275:

1. The superintendent of police shall have supervision, management, and control of, and be responsible to the board for the operation of the department of police and all personnel thereof and for the efficient and effective administration and performance of the duties, powers and functions of suppression of crime and other policing, and law enforcement, including traffic control, in the county invested by this charter in him and in the department of police. The superintendent shall devote his entire time to the duties of his office.

2. The superintendent of police and the department of police, including the dulty authorized officers, agents and deputized representatives thereof shall have all the powers and perform all the duties of the sheriff and the constables with respect to preservation of order, prevention of crimes and misdemeanors, apprehension and arrest, conserving the peace and other police and law enforcement functions, except those powers and duties vested in other departments or officers of the county by this charter. In addition thereto, the superintendent and the department of police shall enforce the ordinances and orders of the council, and have such other powers and duties as may be provided by ordinance including, but not limited to, the performance

of police duties in incorporated areas of the county under contract authorized or entered into by the council with the governing body of any such incorporated area. The superintendent shall also have the power to deputize members of the police departments of the various municipalities of the county and other persons under such standards, conditions and regulations as the board of police commissioners shall approve.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ST. LOUIS COUNTY, MISSOURI, AND COL. G. H. KLEINKNECHT, SUPERINTENDENT, ST. LOUIS COUNTY POLICE DEPARTMENT,
Petitioners,

v.

GARY E. SIMON,
Respondent.

REPLY TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Where a Court of Appeals remands a case to the trial court for further findings of fact consistent with this Court's opinion in *Southeastern Community College* v. *Davis,* 442 U.S. 397 (1979), is such a case ripe for review in this Court by Writ of Certiorari?

B. Does a Court of Appeals have authority to award attorneys fees and costs (including costs of transcript preparation) to a party who succeeds in reversing a judgment of the District Court?

TABLE OF AUTHORITIES

Southeastern Community College v. Davis, 442 U.S. 397 1,3

STATUTES AND MISCELLANEOUS

28 USC Section 1920 4

F.R.A.P. 39(a) 3

No. 81-850

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POLICE DEPARTMENT,
Petitioners,

v.

GARY E. SIMON,
Respondent.

REPLY TO PETITION FOR A WRIT OF CERTIORARI

ARGUMENT AGAINST GRANTING THE WRIT

A.

Contrary to Petitioner's characterization, the Court of Appeals did *not* ". . . decide who a qualified handicapped is . . . in a way which conflicts with this Court's decision in *Southeastern Community College* v. *Davis,* 442 U.S. 397 (1979) (Petition, p. 7)

In that case, this Court noted that:

> "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." (at 399)

In this case the Court of Appeals noted that:

> "Our situation is different from that in *Davis*. There is substantial evidence in the record indicating that the physical requirements of the St. Louis County Police Department were not in fact necessary, or were not required of all officers. There was further evidence indicating that the ability of an officer to be completely transferrable among all positions was not sometimes required in fact." (Slip Opinion, at A-8 in Petition)

The uncontroverted evidence referred to in the Court of Appeal's decision was that:

> 1. The Kansas City, Missouri Police Department employs at least two handicapped commissioned officers. One suffers from severe rheumatoid arthritis; the other is confined to a wheelchair and has limited use of one of his arms.
>
> 2. The Memphis, Tennnessee Police Department employs at least seven handicapped commissioned officers. Their handicaps include loss of a leg; severe crippled leg; severe head injuries; and other permanent disabilities.
>
> 3. The St. Louis County, Missouri Police Department employs at least six commissioned police officers who are (by that Department's definition of "physically qualified") handicapped. The handicaps include loss of a kidney, 85% loss of use of a hand; peptic ulcer; lamanectomy; brain tumor.

There was further substantial evidence accepted by the trial court indicating that Simon could perform without accommodation in several departments of the St. Louis County Police Department, and could perform in several other departments with some accommodation. In contrast, Petitioner's presented no evidence of any kind indicating that they had ever *considered*

the question of what accommodations to Simon's handicap were necessary, feasible, or impractical.

The District Court, in its opinion, made no reference to the uncontroverted evidence described above. Instead, it merely concluded that Simon was precluded from employment under this Court's opinion in *Davis, supra.*

The Court of Appeals was dissatisfied with the state of the record on appeal, and particularly with the District Court's failure to make specific findings of fact in several critical areas. The Court therefore remanded the case to the trial judge for further findings, including:

> 1. whether the Police Department's refusal to modify its requirements was reasonable
>
> 2. whether the stated requirements of the job were reasonable, ligitimate, and necessary
>
> 3. whether there are functions within the Department which Simon has the physical ability to perform. (Slip Opinion, at A-9 and A-10 of Petition).

Nothing which was done by the Court of Appeals in this case conflicted in any way with this Court's opinion in *Davis, supra.* What the Court did here was to remand the case to the trial court for further findings, consistent with this Court's pronouncements in *Davis.* Under these circumstances, the case is simply not ripe for review before this Court, and the Petition should be denied as premature.

B.

F.R.A.P. 39(a) provides, in part, that:

> "... if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.'

28 U.S.C. Section 1920 provides, in part, that:

> "A judge or clerk of any court of the United States may tax as costs the following:
>
> > ... (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case ..."

In this case, the Court of Appeals assessed one-half of the transcript costs to be charged to these Petitioners, as allowed by the rules.

The Court of Appeals also awarded Respondent's attorney a fee of $1500.00.

The Court of Appeals agreed with the District Court's findings that the primary use of federal funds going to the St. Louis County Police Department is to provide employment for commissioned police officers. Thus, the rights, remedies, and procedures of Title VI of the Civil Rights Act of 1964 (402 U.S.C. 2000 et seq.) are available to persons aggrieved under Section 504 of the Rehabilitation Act. (Petition, at A-5 and A-6)

In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 US 400 (1968), this Court noted that:

> "A party seeking to enforce the rights protected by the Statutes covered by [the Civil Rights Attorneys Fees Award Act of 1976], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust ..."

Since the award of attorneys fees is authorized by statute and by this Court's gloss on that statute, the Petition should be denied as to this issue.

CONCLUSION

The Petition for Writ of Certiorari should be denied because the Court of Appeals has not finally decided the issues (as characterized by Petitioner) but has instead remanded the case to the District Court for further findings of fact. This Court should not burden its otherwise overcrowded docket by hearing what is, in effect, an interlocutory appeal.

Respectfully submitted,

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